UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 15

Fresenius Kidney Care Dauphin Island Parkway, **Employer,** **and** **Retail, Wholesale and Department Store Union,** **Petitioner.**	**CASE NO. 15-RC-201753**

EMPLOYER'S EXCEPTIONS TO REGIONAL DIRECTOR'S REPORT AND RECOMMENDATION ON OBJECTIONS

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Pursuant to Section 102.69 of the National Labor Relations Board's ("NLRB") Rules and Regulations, Bio-Medical Applications of Alabama, Inc., d/b/a Fresenius Kidney Care Dauphin Island Parkway ("Fresenius" or "Employer") hereby files its exceptions to the Regional Director's Report and Recommendation on Objections. For the reasons set forth below, Fresenius respectfully requests that the Board set aside the election and direct a new election based on upon the Retail, Wholesale and Department Store Union, Local 932's ("RWDSU" or "Union") objectionable conduct. At the very least, Fresenius requests that the Board direct the Regional Director to schedule a hearing so that Fresenius has an adequate opportunity to develop the factual record in support of its Objections.

STATEMENT OF FACTS

A. Procedural Background

Fresenius provides dialysis services to patients at outpatient facilities or hospitals and operates dialysis clinics, including the clinic located at 2381 Dauphin Island Parkway, Mobile, Alabama 36605 (the "DIP clinic"). As such, Fresenius is a "health care institution" within the meaning of Section 2(14) of the Act. The goals of Fresenius include providing the highest standard of care to its patients and treating its patients with respect and dignity so they experience excellence each and every time they visit a Fresenius dialysis facility.

On July 5, 2017, the Union filed a representation petition regarding the DIP clinic. Fresenius and the Union entered into a Stipulated Election Agreement, which was approved by the Regional Director on July 18, 2017, with a *Sonotone* election for separate units of professional and non-professional employees. The stipulated professional bargaining unit included "[a]ll full-time, regular part time, and per diem registered nurses, social workers, and dieticians," and the stipulated non-professional bargaining unit included "[a]ll full-time, regular part-time, and per diem patient care technicians, biomedical technicians, and ward clerks." On

August 2 and 3, 2017, a representation election was held at the DIP clinic, and a majority of the employees at the clinic voted in favor of unionizing a combined professional and non-professional unit. After the election, on August 10, 2017, Fresenius timely filed its Objections to the election and its Offer of Proof in support of its Objections.[1] (Exhibit 1, Objections and Offer of Proof). On July 19, 2018, without a hearing, the Regional Director issued a Report and Recommendation on Objections, recommending dismissal of all of Fresenius's objections.

B. The Union Engages in Unlawful Picketing During the Critical Pre-Election Period

On July 11, 2017, prior to the union election and during the critical period, non-employee Union representatives picketed at the DIP clinic in violation of Section 8(g) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 151 et seq. (the "Act" or "NLRA"). The Union did not provide a 10-day notice, or any notice at all, to Fresenius regarding its plan to picket the clinic. The picketers stood *in* and immediately next to the only driveway entrance to the clinic, while holding picketing signs, and stopped and engaged in conversations with multiple patients and/or other individuals in vehicles entering and exiting the clinic. The representatives picketed at the DIP clinic at two different times on July 11, 2017—once for approximately 30 minutes and once later in the morning for over two hours. This occurred a mere three weeks prior to the representation election.

The Union's unlawful misconduct was recorded by both video and photograph, which shows the picketers on the sidewalk, the picketers standing in the entranceway to the clinic, the picketers talking to passengers in cars that the picketers stopped in the entranceway, vehicles with patients, employees, and third parties entering the entranceway where the picketers were stationed. The Union's unlawful misconduct was also witnessed by and involved or impacted

[1] Though Fresenius filed its Offer of Proof with its Objections on August 10, 2017, the Regional Director claimed the Region did not receive the Offer of Proof. Thus, Fresenius timely re-filed its Offer of Proof on August 17, 2017.

multiple Fresenius employees. For example, Registered Nurse ("RN") Tyva Gullette arrived at the clinic around 5:00, saw the picketers with their signs, and was asked by patients who the picketers were, what was going on, and why they were present. Clinic Manager Harriett Watters was informed about the morning picketers, saw the picketers during the middle of the day, and saw the picketers walk in the entranceway to talk to the passenger(s) of a dark truck. Lead Employee Relations Manager Melissa Jacobs also observed the picketers, including them talking to a black male in a pickup truck stopped in the entranceway. In its Offer of Proof, Fresenius identified Gullette, Watters, and Jacobs as witnesses who would testify as to the facts above and that the entranceway that was picketed is the only entranceway to the clinic, meaning that each and every individual entering or exiting the clinic, including employees and patients, had to drive directly by the picketers. (*See* Ex. 1).

Based on the Union's July 11, 2017 picketing, Fresenius filed an unfair labor practice charge against the Union on July 19, 2017, Case No. 15-CG-204243. (Exhibit 2, July 19, 2017 8(g) Charge).[2] On September 29, 2017, the Regional Director issued a long-form dismissal, dismissing Fresenius's picketing charge against the Union. (Exhibit 3, Long-form Dismissal). Fresenius timely filed its appeal of the dismissal with the Appeals Division of the Office of the General Counsel of the NLRB. On February 2, 2018, the Office of the General Counsel found merit to Fresenius's allegations, sustaining its appeal and directing that, absent settlement, the Regional Director issue a Complaint and a hearing be held before an administrative law judge. (Exhibit 4, Office of the General Counsel Letter). The Union entered into a Settlement Agreement to avoid the issuance of a Complaint by the Regional Director. (Exhibit 5, Settlement

[2] For the Board's convenience, Fresenius has attached as exhibits the July 19, 2017 Charge filed by Fresenius, the Region's Long-form Dismissal, the Office of the General Counsel's letter sustaining Fresenius's Appeal, and the Settlement Agreement between the Union and the Region. Additional evidence in support of Fresenius's Charge was previously submitted to and is in the possession of the Regional Director and/or the Board, and thus Fresenius incorporates by reference such evidence herein.

Agreement). The Settlement Agreement required the Union to post a notice at the DIP clinic stating, "WE WILL NOT engage in picketing at Fresenius Kidney Care Dauphin Island Parkway . . . if we have not given Fresenius and the Federal Mediation and Conciliation Service 10 days notice of that intention." (Ex. 5).

C. The Union's Objectionable Activity During the Representation Election

As mentioned above, a union election was held at the DIP clinic on August 2 and 3, 2017. Martavious Hall, who was employed by Fresenius at the DIP clinic as a Patient Care Technician, served as the Union observer. On August 2, 2017, after the pre-election conference and about 10 minutes before the start of voting, Melissa Jacobs observed Hall, who was off-duty, talking to numerous employees in the patient treatment area (in violation of company policies and state regulations) for approximately 10 minutes. In its Offer of Proof, Fresenius identified Jacobs as a witness who would testify to the facts above. (*See* Ex. 1).

In addition, on August 3, 2017, Jacobs heard Union Representative Josh Brewer state that Hall was on his payroll that day. The comment was made during the election at West Mobile. Hall was not scheduled to and did not work for Fresenius on August 3, 2017, and served as an election observer for only two hours that day. In its Offer of Proof, Fresenius identified Jacobs as a witness who would testify to the facts above. It also identified Harriett Watters as a witness who would testify to Hall's schedule and company policies. (*See* Ex. 1).

The Union also engaged in multiple instances of misconduct during the voting period. On August 2, 2017, Union observer Hall kept a cell phone in his pocket during the voting period at the clinic. Prior to the start of the election, Jacobs asked the NLRB representative to advise Hall to turn off his cell phone. The NLRB agent disagreed and said that he could monitor the observer's activity but not tell him to turn off his phone. Hall kept the cell phone in his pocket

and did not appear to turn it off. This was observed by both Jacobs and Consultant Sherry Henry. The following day, Union Representative Josh Brewer stated to Jacobs that he would advise Hall to turn off his cell phone during the election. In its Offer of Proof, Fresenius identified Jacobs and Henry as witnesses who would testify to the facts above. (*See* Ex. 1).

Finally, on August 2, 2017, a non-employee Union representative went to the polling area—the conference room in which the voting occurred and a place she was not supposed to be—approximately 20 minutes before the voting period ended and then stationed herself outside of the building looking through a glass door, which allowed her to see voters entering the polling area and them to see her. More specifically, approximately 20 minutes before the conclusion of the voting time, RN Sheila White was stationed at the clinic window when the Union representative arrived at the clinic and asked her where the election was being held. When White asked the Union representative if she wanted to go to the voting area, the representative confirmed that she did. White escorted the Union representative through the offices of the clinic to the conference room where the voting was taking place. After the Union representative stepped to the open conference room door and saw the election signage, she said she could not go into the conference room. The Union representative was visible to observers and voters in the room, and the NLRB agent asked who she was.

The Union representative then exited to the right through a glass door to the outside. Melissa Jacobs, Sherry Henry, and Director-Employee Relations Denise Patterson observed the Union representative standing immediately outside of the building for most of the last 15 minutes of the voting period, looking through a glass door such that she could see voters entering the conference room to vote. Likewise, employees entering the conference room to vote could see

the Union representative. In its Offer of Proof, Fresenius identified White, Jacobs, Henry, and Patterson as witnesses who would testify to the facts above. (*See* Ex. 1).

ARGUMENT

Under Sections 102.69 and 102.67(d) of the NLRB's Rules and Regulations, a request for review of a Regional Director's decision in a representation case may be granted on one or more of the following grounds:

> (1) That a substantial question of law or policy is raised because of:
> (i) the absence of; or
> (ii) a departure from, officially reported Board precedent.
>
> (2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
>
> (3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
>
> (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

29 C.F.R. § 102.67(d). Here, the Regional Director issued a Report and Recommendation on Objections, recommending that all of Fresenius's objections be dismissed. By recommending dismissal of Fresenius's objections, the Regional Director both departed from Board precedent and made clearly erroneous decisions based on the record regarding substantial factual issues, which prejudicially affects the rights of Fresenius. In addition, there are compelling reasons for reconsideration of an important Board rule or policy. Accordingly, the Board should review the Regional Director's decision pursuant to Sections 102.67(d)(1) and (2).

I. The Union's Misconduct Tended to Interfere with Employees' Free Choice And Was Not De Minimis.

It is well-settled that "laboratory conditions" are expected to be maintained during the critical period—the period between the filing of the petition through the election. *MEK Arden,*

LLC, 365 NLRB No. 109 (2017). "An election can serve its true purpose only if the surrounding conditions enable employees to register a free and untrammeled choice for or against a bargaining representative." *Gen. Shoe Corp.*, 77 NLRB 124, 126 (1948). An election must be set aside if a party's objectionable conduct "reasonably tend[ed] to interfere with employees' freedom of choice in the election." *Baja's Place*, 268 NLRB 868, 868 (1984); *see Cambridge Tool & Mfg. Co.*, 316 NLRB 716, 716 (1995) (finding that three instances of objectionable conduct two to three weeks prior to the election "tend[ed] to interfere with results of the election"). But in making this determination, the Board "does not inquire whether a[] [party's] actions . . . actually affected the results of the election." *Lake Mary Health & Rehabilitation*, 345 NLRB 544, 545 (2005).

To determine whether certain conduct warrants setting aside an election result, the Board considers "(1) the number of incidents of misconduct; (2) the severity of the incidents and whether they were likely to cause fear among employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election date; (5) the degree of persistence of the misconduct in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among bargaining unit employees; (7) the effect, if any, of the misconduct by the opposing party to cancel out the effect of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party." *Student Trans. Of Am., Inc.*, 362 NLRB No. 156, *2 (2015) (citing *Cedars-Sinai Med. Ctr.*, 342 NLRB 596 (2004) and *Lake Mary Health & Rehabilitation*, 345 NLRB 544, 545 (2005)); *see, e.g.*, *Metz Metallurgical Corp.*, 270 NLRB 889, at *2 (1984) (finding a single isolated conversation with one employee in a large unit

17 days before the election to be de minimis conduct where there was no other objectionable conduct).

A. Exceptions Applicable to Regional Director's Recommendation on All Objections

1. The Regional Director Failed to Consider the Objections Cumulatively and in Light of the Factors Relevant to Determine Whether an Election Should Be Set Aside.

2. The Regional Director Failed to Hold a Hearing Despite Evidence That, If True, Could Warrant Setting Aside the Election.

Standing alone, the misconduct at issue in each of Fresenius's objections is not de minimis, but it is certainly not de minimis when measured by the cumulative effect of the Union's repeated misconduct before and during the representation election. In dismissing Fresenius's objections, the Regional Director fails to address the cumulative effect of the Union's misconduct entirely. *See generally Aramark Sports, LLC*, 2011 WL 5868414 (2011) (finding that cumulative effect of electioneering at or near the polls by union observer, use of cell phone by union observer, and prolonged conversations between union observer and voters, among other things, warranted setting aside the election). To be sure, the Regional Director failed to consider the factors relevant to setting aside an election altogether.

First, the number of incidents of misconduct by the Union, the persistence of the Union's misconduct, and the full degree to which the misconduct can be attributed to the Union weighs in favor of setting aside the election. In a three-week span, the Union engaged in five separate acts of misconduct—four of which occurred on the days of the election. Second, the number of employees in the bargaining unit subjected to the misconduct and the extent of dissemination of the misconduct among bargaining unit employees weighs in favor of setting aside the election. Multiple employees in an already small bargaining unit (only 20 employees) were subjected to at least three of the five instances of Union misconduct—the Union's unlawful picketing, improper

electioneering, and improper presence in the polling area. Further, at least one additional employee was involved in the other two instances of Union misconduct, including improper payments to the Union observer. Though Fresenius lost the election by six votes, there is no question that at least six employees were subjected to the Union's misconduct. Third, the proximity of the Union's misconduct to the election weighs in favor of setting aside the election. Though the Union's picketing occurred three weeks prior to the election, the rest of the Union's misconduct occurred on the days of the election.

Finally, Fresenius was denied due process in that the Regional Director failed to hold a hearing prior to issuing a decision on Fresenius's objections. 29 C.F.R. § 102.69(d) provides:

> If timely objections are filed to the conduct of the election or to conduct affecting the results of the election, and the Regional Director determines that the evidence described in the accompanying offer of proof *could* be grounds for setting aside the election if introduced at a hearing, . . . the Regional Director *shall* transmit to the parties and their designated representatives . . . a Notice of Hearing before a Hearing Officer at a place and time fixed therein.

(emphasis added). Stated differently, "In order to obtain a hearing in a postelection representation proceeding, the objecting party must supply prima facie evidence, presenting substantial and material factual issues, which would warrant setting aside the election." *NLRB v. Genesco, Inc.*, 406 F.2d 393, 395 (5th Cir. 1969); *Int'l Union of Electrical, Radio and Machine Workers, etc. v. NLRB*, 418 F.2d 11941, 1196 (D.C. Cir. 1968) (stating that an evidentiary hearing is required to resolve "substantial factual issues [] raised"). This is the same standard as the constitutional standard applied under the due process clause. *Id.* As demonstrated below, Fresenius presented *prima facie* evidence of misconduct that, if true, could warrant setting aside the election. Substantial and material issues exist that can only be determined properly by a hearing, and by failing to grant a hearing, the Regional Director's action constitutes prejudicial error.

B. Exceptions to Regional Director's Recommendation on Objection #1 – Picketing in Violation of Section 8(g)

1. The Regional Director Incorrectly Found that Fresenius Did Not Provide the Date of Picketing.

2. The Regional Director Incorrectly Concluded that No Employees Were Involved or Threatened in Any Way.

3. The Regional Director Completely Failed to Analyze the Effect the Union's Unlawful Picketing Could Have Had on the Election and Thus Departed from Board Precedent.

The Regional Director only offers two justifications for dismissing Fresenius's objection regarding the Union's unlawful picketing in violation of Section 8(g). The Regional Director recommends dismissal of Objection #1 primarily because "the Employer fails to provide a date as to the alleged picketing." But Fresenius plainly states in Objection #1 the date on which the picketing took place. In fact, the very first line of Objection #1 states, "*On July 11, 2017*, prior to the election, non-employee RWDSU representatives picketed at the DIP clinic in violation of Section 8(g)." (Ex. 1) (emphasis added). While Fresenius's Offer of Proof does not specifically state the date of the picketing, it directly references and offers support for Objection #1—the Union's July 11, 2017 picketing. In other words, the Regional Director's reliance on this reasoning to dismiss Fresenius's objection is based on a substantial mistake of fact entirely unsupported by the record and constitutes prejudicial error.

The Regional Director alternatively recommends dismissal of Objection #1 because "the Employer failed to provide any evidence that employees were involved or threatened in any way." Like the Regional Director's first reason for dismissal, this reason is also unsupported by the record and contradicted by Fresenius's Objections and Offer of Proof. *See generally Plumbers (AFL-CIO) Local 142 (Shop-Rite Foods Inc.)*, 133 NLRB 307, 329 (1961) (recognizing that "there is inherent in the act of picketing a coercive influence"); *Carpenters*

Local 1144 (Cristalla, LLC) Pacific Northwest Reg'l Council of Carpenters (Cristalla, LLC), Advice Memorandum, 2005 WL 6715419 (Jan. 25, 2005) (acknowledging that "picketing is inherently coercive"). Indeed, in its Offer of Proof, Fresenius specifically identifies multiple employees who were involved in or impacted by the picketing incident. For example, Fresenius identified RN Tyva Gullette as an employee in the bargaining unit who "arrived around 5:00 and saw the picketers with their signs" and was asked by patients "who the picketers were, what was going on, and why were they present." Further, all of the witnesses identified in Fresenius's Offer of Proof would have testified that "the entranceway that was picketed is the only entranceway to the clinic," meaning that each and every employee who entered and/or exited the lone driveway entrance to the clinic during the picketing was necessarily involved in and affected by the Union's picketing.

Misconduct that constitutes an unfair labor practice "found to have occurred during the critical election period is, *a fortiori*, conduct which interferes with the results of the election unless it is so de minimis that is 'virtually impossible to conclude that [the violation] could have affected the results of the election.'" *Airstream, Inc.*, 304 NLRB No. 28, 152 (1991) (quoting *Enola Super Thrift*, 233 NLRB 409, 409 (1977)). Though the Board has held that picketing in violation of Section 8(g) generally does not have a significant connection with the threat of restraint and coercion of employees such that it warrants setting aside an election, this is not such a case.

There is no dispute that the Union engaged in unlawful picketing in violation of Section 8(g). The Union was in fact forced to enter into a Settlement Agreement to avoid the issuance of a Complaint by the Regional Director. A mere three weeks prior to the election, the Union (1) stood in and near the *only* driveway entrance to the clinic, which is in clear view of the door to

the clinic, at times when employees and patients were entering and exiting the clinic, (2) held signs while walking back and forth on the sidewalk on either side of the driveway, (3) stopped multiple vehicles in the driveway entrance, including vehicles with patients inside, (4) held prolonged conversations with the individuals in the stopped vehicles, with one conversation lasting approximately three to five minutes, and (5) engaged in such behavior twice in the same day—once for more than two hours. In other words, at the very least, multiple employees, or eligible voters, were aware of the picketing and would have driven through the picketing, having no other option to enter and exit the clinic. Further, as stated above, at least one employee, who was an eligible voter, will testify that she was asked multiple questions about the picketers by patients of the clinic.

Based on these facts, it is not "virtually impossible" to conclude that the Union's picketing could have affected the results of the election, and the substantial factual issues raised by Fresenius at the very least entitled it to a hearing. The Regional Director, however, failed to consider any of these facts and departed from Board precedent by failing to consider whether the Union's unlawful picketing involved the threat of restraint and coercion of employees under these circumstances.

C. Exceptions to Regional Director's Recommendation on Objection #2 – Union Representative in Polling Area

1. The Regional Director Incorrectly Found that the Union Representative Was Escorted by Fresenius Management.

2. The Regional Director Misapplied and Departed from Board Precedent and Incorrectly Concluded that Fresenius Provided No Evidence of Interference with Election Procedures.

Again, the Regional Director committed prejudicial error by basing the recommendation to dismiss Fresenius's objection on clearly erroneous mistakes of fact and by departing from Board precedent. As an initial matter, the Regional Director states that Fresenius's evidence

showed that the "Employer's *management* escorted the Union representative to the polling place before the polls closed." This appears to be a justification put forth by the Regional Director as to why the Union representative's presence in the polling area was harmless, or did not have "any obvious effect on balloting or any tendency to affect it." But according to the parties' Stipulated Election Agreement, RN Sheila White, who escorted the Union representative to the polling area, was an eligible voter in the union election, not a supervisor as defined by the Act. In other words, the only person who impermissibly went to and stepped inside the conference room during the voting period was the Union representative.

Next, the Regional Director incorrectly requires that Fresenius put forth evidence of actual interference with election procedures. In fact, in large part, the Regional Director bases her decision on the fact that Fresenius "did not provide any evidence of actual interference with election proceedings." However, the Board has long recognized that "[e]lection rules which are designed to guarantee free choice must be strictly enforced against material breaches in every case, or they may as well be abandoned." *Int'l Stamping Co., Inc.*, 97 NLRB 921 (1951). With respect to established Board election procedures that are "fundamental to free elections," the Board has held that "the fact that there is no showing of actual interference with the free choice of any voter . . . is of no moment." *Id.*; *see also Lake Mary Health & Rehab.*, 345 NLRB 544, 545 (2005); *Kilgore Mfg. Co.*, 45 NLRB No. 69 (1942) (setting aside election where union representative was stationed outside of polling place and stating that "[w]e believe that the purposes of the Act will best be effectuated by a strict enforcement of elections rules and an equally strict observance of them by the representatives of the interested parties. To require, in each case, a nice measurement of the actual coercive or intimidatory effort of misconduct on the results of the election, would place an undue burden on the objecting party and the Board").

Nevertheless, even if a showing of actual interference is required (it is not), the Board erroneously relies on *Roney Plaza Management Corp.*, 310 NLRB No. 58 (1993), to support its conclusion that the Union representative did not actually interfere with election procedures. This case is inapposite. In *Roney Plaza Management Corp.*, it was undisputed that when the Employer's attorney entered the voting area, there was only one other employee present, and he had already voted and was waiting to file his challenged ballot. The Board further found that "in all likelihood, no employees even recognized Respondent's attorney as an agent of Respondent." The same cannot be said in this case. Indeed, as stated in its Offer of Proof, White (an eligible voter) escorted the Union representative to the conference room where the voting was taking place, the Union representative was visible to observers and voters when she stepped inside the conference room, and the NLRB agent explicitly asked the Union representative who she was—removing any doubt as to who she was.

Even if the Union representative's presence in the conference room was "brief" like the Employer's attorney's presence in *Roney Plaza*, the Union representative then stationed herself outside of a glass door, through which she could see voters enter the conference room to vote and, more importantly, they could see her, for the remaining 15 minutes of the voting period. The Board has found that "a party's mere presence may be sufficient to justify setting aside an election." *Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981, 992 (D.C. Cir. 2001) (collecting cases). In a similar context where a party was stationed in a place that employees had to pass in order to vote, the Board recognized that "without any explanation for a [party] to be 'stationed' outside the voting area, it can only be concluded that his purpose in observing the even[t] was to effectively survey the union activities of the employees and to convey to these employees the impression that they were being watched." *Electric Hose & Rubber Co.*, 262 NLRB No. 14, *48

(1982). Stated differently, "[T]he unexplained presence of [parties] at points the employees had to pass in order to vote is found to be coercive evidence of such a nature as to have destroyed the laboratory conditions necessary for the conduct of a free and fair election" and thus warrants setting aside an election. *Id.* at *49.

It makes no difference whether the party stationed in an area where employees have to pass to vote is the employer or the union, and the party so stationed does not have to be "immediately outside of the actual polling area." *Nathan Katz Realty, LLC*, 251 F.3d at 992. "[A] party engage[s] in objectionable conduct sufficient to set aside an election if one of its agents is continually present in a place where employees have to pass in order to vote." *Id.* at 993 (finding that the presence of Union agents, who were stationed inside a car outside the building entrance of the voting site and not the classroom entrance in which the voting occurred, "constitute[d] conduct of such a nature that it substantially impaired the . . . employees' exercise of free choice—even if the agents did not actually talk to anyone").

Here, *without explanation*, the Union representative purposely entered the conference room where the election was held during the voting period. This was intentional misconduct. She specifically asked where the election was being held and confirmed that she wanted to go to that location. After entering the conference room, she then intentionally stationed herself outside of the glass door through which she watched voters enter the voting area and through which voters could see her as they entered to vote. The only plausible purpose for the Union representative's presence was to "convey to employees the impression that they were being watched." As the D.C. Circuit admonished in *Nathan Katz Realty, LLC*, "It is axiomatic that an agency adjudication must either be consistent with prior adjudications or offer a reasoned basis for its departure from precedent." *Id.* at 993. The Regional Director's decision in this case did neither.

Though the election should be set aside based on Board precedent, Fresenius is, at the very least, entitled to a hearing on this objection.

D. Exceptions to Regional Director's Recommendation on Objection #3 – Union Observer with Cell Phone

1. The Regional Director Incorrectly Assumes, Without Explanation and Without Granting Fresenius the Opportunity at a Hearing to Develop the Factual Evidence to Support Its Objection, that the Union Observer Did Not Use His Cell Phone.

The Regional Director recommends dismissal of Fresenius's objection to Union observer Martavious Hall having his cell phone on for the entirety of the voting period on August 2, 2017, because Fresenius "did not provide any evidence or proof that the Union's observer used his cell phone to communicate with any outside parties" and because "there is no evidence that this conduct in anyway interfered with the election." As an initial matter and as discussed above, a showing of actual interference with the election is not required. *See Lake Mary Health & Rehab.*, 345 NLRB 544, 545 (2005).

Further, Hall and the Union, by virtue of Hall acting as its agent on August 2, 2017, are in the exclusive possession of the evidence to determine whether Hall did in fact use his cell phone to communicate with other employees, to engage in improper electioneering, or to create a list of the individuals who voted in the election.[3] *See generally Int'l Stamping Co.*, 97 NLRB 921 (1951) (stating that it has "been the policy of the Board to prohibit anyone from keeping any list of persons who have voted"). Unlike the Union, no representative of Fresenius entered the voting area to observe employees voting. Nonetheless, the Regional Director concluded that Hall did not use his cell phone during the voting period without giving Fresenius the opportunity to develop the factual evidence to support its objection.

[3] Though Fresenius objected at the time of the election to Hall's cell phone being on during the election, the NLRB agent merely informed Fresenius that he could not tell Hall to turn his cell phone off.

To support its dismissal of this objection, the Regional Director curiously relies on *St. Vincent Hospital, LLC*, 344 NLRB 921 (2005). In *St. Vincent Hospital*, both the Union observer and the Employer observer used the telephone in the voting area, with the permission of the Board agent and with no voters present, to address family matters. This case has no bearing on whether Hall used his cell phone for impermissible reasons during the voting period. As the Board held in *International Stamping Co.*, "[C]onfidence in, and respect for, established Board election procedures cannot be promoted by permitting . . . conduct," such as keeping a list of persons who have voted, among other things. *Id.* at 923 and n.5 (stating that "these rules were adopted by the Board because of its belief, based on experience, that any material breach thereof, as in the present case, would tend to prevent free choice in the selection of a representative"). Fresenius, at the very least, should be given the opportunity at a hearing to determine whether violations of such procedures occurred.

E. Exceptions to Regional Director's Recommendation on Objection #4 – Union Observer Paid by Union

1. The Regional Director Incorrectly Assumes, Without Explanation and Without Granting Fresenius the Opportunity to Develop the Factual Evidence to Support Its Objection, That Hall's Payment from the Union Was Not "Excessive or Unreasonable."

The Regional Director first criticizes Fresenius for "speculating" about the possibility of Hall being paid by the Union to act as an observer during a voting period of the election. However, it is only the Regional Director who speculates. In its Offer of Proof, Fresenius stated that Melissa Jacobs would testify that on August 3, 2017, she heard Josh Brewer (non-employee Union representative) state that Martavious Hall (Union observer) "was on his payroll that day." Fresenius also submitted that Jacobs and Harriett Watters would testify that Hall was off that day and that Hall served as an election observer on that day for only two hours. To be clear, witness testimony regarding comments made by Brewer about paying Hall is not speculation. Though

Fresenius does not know the exact amount paid to Hall by the Union, if Hall served as an election observer for two hours and was paid for an entire day's worth of work as was declared by Union representative Brewer, such an amount would be unreasonable and excessive. And if this is true, the Union's misconduct warrants setting aside the election. In other words, Fresenius has provided *prima facie* evidence of misconduct that warrants setting aside the election. Despite this evidence and without a hearing, the Regional Director concluded that the payment made by the Union to Hall was not unreasonable or excessive. The Regional Director's conclusion is without any foundation and completely speculative.

Giving payments or inducements to prospective voters in a representation election is grounds for setting aside the election. *NLRB v. Commercial Letter, Inc.*, 455 F.2d 109, 111 (8th Cir. 1972). To determine whether an election should be set aside on this ground, the Board asks "whether the payment was intended to or would influence the election and thus impair a free choice on the part of the employees." *Id.* "There can be no question but that freedom of choice may be seriously interfered with by economic inducements." *Id.* at 112.

While it is true that, absent unreasonable or excessive economic inducements, the fact that a union observer is paid does not constitute ground for setting aside an election, without a hearing or the opportunity to develop the factual evidence necessary to support its objection, Fresenius had no way to determine the exact amount Hall was paid by the Union and whether it was unreasonable or excessive. Rather, the evidence necessary for Fresenius to show that Hall was paid an unreasonable or excessive amount is in the exclusive possession of the Union and Hall. If employers, like Fresenius, are not given the benefit of a hearing in these circumstances—circumstances in which the employer has *prima facie* evidence that unreasonable or excessive payments were made—Unions will be allowed to pay their observers any amount, no matter how

much, and simply keep it a secret to prevent employers from prevailing on objections to such payments. Needless to say, this result would undermine the purpose of the Board's election procedures and the goal to enable employees to register a free and untrammeled choice in a representation election. Put simply, failing to grant a hearing in these circumstances is prejudicial error. *See* 29 C.F.R. § 102.69(d); *NLRB v. Genesco, Inc.*, 406 F.2d 393, 395 (5th Cir. 1969).

F. Exceptions to Regional Director's Recommendation on Objection #5 – Union Observer Politicking in Election Area

1. The Regional Director Incorrectly Found, Without a Hearing, That There Is No Evidence That the Union Observer Engaged in Objectionable Conduct, Such as Prolonged Conversations or Coercion.

2. The Regional Director Misapplied Board Precedent and Incorrectly Concluded That the Union Observer Did Not Engage in Objectionable Conduct.

The primary basis for the Regional Director's recommendation to dismiss Fresenius's objection related to Union observer Martavious Hall engaging in improper electioneering is that Hall did not engage in prolonged conversations with other employees. Specifically, the Regional Director, without any basis, concluded that "there is no evidence the [Union] observer engaged in any conduct such as prolonged conversations or coercion which constitute objectionable conduct." But as stated in Fresenius's Objections and Offer of Proof, Hall talked to numerous employees in the patient treatment area after the pre-election conference and *for approximately 10 minutes* before the start of the voting period. In other words, Hall did in fact engage in prolonged conversations with eligible voters.

The Board has long held that "[t]he final minutes before an employee casts his vote should be his own, as free form interference as possible." *Milchem, Inc.*, 170 NLRB No. 362, 362 (1968). Prolonged conversations with prospective voters waiting to cast their ballots, regardless of the content of the conversations, are expressly prohibited and necessitate a second

election. *Id.* at 362. But this is not the only impermissible electioneering that warrants setting aside an election. Rather, impermissible electioneering has been extended to the "polling area" and to areas "at or near" the polls. "When faced with evidence of impermissible electioneering, the Board determines whether the conduct, under the circumstances, is sufficient to warrant an inference that it interfered with the free choice of the voters." *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118, 1118-19 (1982). To make this determination, the Board examines a number of factors, including "whether the conduct occurred within or near the polling place, but also the extent and nature of the alleged electioneering, [] whether it is conducted by a party to the election or by employees[, and] . . . whether the electioneering is conducted within a designated 'no electioneering' area or contrary to the instructions of the Board agent." *Id.* at 1119.

To support its conclusion that Hall did not engage in objectionable conduct, the Regional Director relies on *C&G Heating & Air Conditioning*, 356 NLRB 1054 (2011). Though the Regional Director claims that the facts in that case are "similar" to the facts in this case, there is nothing similar about them. As the Regional Director acknowledges, in *C&G Heating & Air Conditioning*, the Union representative sat in a parked vehicle on the public street adjacent to the garage where employees entered to vote and did not engage in any conversations with employees as they went to vote. Conversely, Hall engaged in prolonged conversations with multiple employees "at or near the polls" for approximately 10 minutes immediately prior to the start of the voting period. Though Hall was a Fresenius employee, he was acting as the Union observer, or as an agent of the Union, at the time of the improper electioneering.

In summarizing the Union's misconduct, the Regional Director states that the "mere fact that the Petitioner's employee observer may have encountered a voter near or at the polling place

prior to the start of the election is not by itself objectionable conduct." If the evidence submitted by Fresenius showed that Hall simply encountered a voter at or near the polling place, the Regional Director's findings may be supported by the evidence. But that is not the evidence. Hall did not "encounter a voter." He intentionally went into a patient care area where he did not belong in an effort to talk to other employees. There is nothing haphazard about that, and the Regional Director's conclusion is completely unsubstantiated by the facts. Those facts show far more—that Hall did in fact engage in objectionable conduct that warrants the setting aside of the election.

Again, despite Fresenius's *prima facie* evidence of objectionable conduct that, if true, could warrant the setting aside of the election, the Regional Director failed to grant a hearing.

CONCLUSION

Based on all of the foregoing misconduct, the Union interfered with Fresenius employees' free choice and attempted to coerce, intimidate, or harass Fresenius's employees, patients, and vendors, and consequently, a majority of the employees at the DIP clinic voted in favor of unionizing a combined professional and non-professional unit. Accordingly, Fresenius respectfully requests that the Board set aside the election and direct a new election. Alternatively, and at the very least, Fresenius requests that the Board direct the Regional Director to schedule a hearing as required by statute and Board precedent such that Fresenius has the opportunity to fully develop the factual record in support of its Objections.

Respectfully submitted,

/s/ M. Jefferson Starling, III
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BALCH & BINGHAM LLP
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CERTIFICATE OF SERVICE

I do hereby certify that on this the 2nd day of August, 2018, a true and correct copy of the foregoing document was filed with the Executive Secretary, National Labor Relations Board, and Region 15 using the NLRB's e-file procedures and served by e-mail or U. S. Mail on the following:

M. Kathleen McKinney
Regional Director
National Labor Relations Board
Region 15
600 S. Maestri Place, 7th Floor
New Orleans, LA 70130-3413

Robert. M. Weaver
E-mail: rweaver@qcwdr.com
George N. Davies
E-mail: gdavies@QCWDR.COM
Quinn, Connor, Weaver, Davies & Rouco LLP
Birmingham Office
Two North Twentieth
2 – 20th Street North, Suite 930
Birmingham, AL 35203

/s/ M. Jefferson Starling, III
M. Jefferson Starling, III

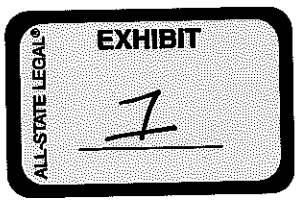
NATIONAL LABOR RELATIONS BOARD
REGION 15

Fresenius Kidney Care Dauphin Island Parkway, **Employer,** **and** **Retail, Wholesale and Department Store Union,** **Petitioner.**	**CASE NO. 15-RC-201753**

EMPLOYER'S OBJECTIONS TO CONDUCT OF ELECTION

The National Labor Relations Board (the "Board") conducted a representation election on August 2, 2017 and August 3, 2017 for Bio-Medical Applications of Alabama, Inc. d/b/a Fresenius Kidney Care Dauphin Island Parkway's ("Fresenius") full-time, regular part-time, and per diem employees. Fresenius objects to certain conduct of the Retail, Wholesale and Department Store Union ("RWDSU") during and prior to the election period. On August 3, 2017, the unchallenged ballots were counted with a majority of those ballots cast for the RWDSU. Pursuant to Section 102.69(a) of the Board's Rules and Regulations, Fresenius files these Objections to conduct affecting the results of the election.

OBJECTION #1: On July 11, 2017, prior to the election, non-employee RWDSU representatives picketed at the DIP clinic in violation of Section 8(g). The RWDSU did not provide a 10-day notice, or any notice at all, to Fresenius regarding its plan to picket the clinic. The representatives stood in and immediately next to the only driveway entrance to the clinic while holding picketing signs and stopped and engaged in conversation with at least one vehicle, which had a patient inside. The representatives picketed at the DIP clinic at two different times on July 11, 2017—once for approximately 30 minutes and once later in the morning for over two hours. *IUOE Local 99 (National Lutheran Home for the Aged)*, 30 NLRB Advice Mem. Rep. 40044, 2001



WL 36368443 (2001) ("[P]icketing that takes place on the sidewalks surrounding a healthcare institution and at the driveway entrances to the facility clearly constitutes picketing "at" a healthcare institution within the meaning of Section 8(g)."); *Dist. 1199, Nat'l Union of Hosp. and Health Care Emps. (South Nassau Cmtys. Hosp.)*, 256 NLRB 74, 76 (1981) ("It is not enough to say that no stoppage occurred because of the picketing or that the picketing was of such short duration. . . . [T]he very act of picketing could have induced a stoppage to the detriment of ailing patients. This cannot be tolerated for whatever period of time."); *Orange Belt Dist. Council of Painters No. 48*, 243 NLRB No. 113 (1979) (concluding that the union violated Section 8(g) by picketing at one of the hospital's main driveway entrances, which was used by hospital employees and suppliers). Such conduct interfered with Fresenius employees' free choice and attempted to coerce, intimidate, or harass Fresenius's employees, patients, and vendors.

OBJECTION #2: During the voting period, a non-employee RWDSU representative went to the polling area, a place she was not supposed to be. The representative went to the conference room in which the voting occurred 20 minutes before the voting period ended. She was visible to employees, observers, and the NLRB agent who were in the voting area in the conference room. The RWDSU representative then turned to the right and walked through a glass door to the outside of the building. She stood immediately outside of the building for most of the last 15 minutes of the voting period, looking through a glass door such that she could see voters enter the polling area and they could see her. Such conduct interfered with Fresenius employees' free choice and attempted to persuade, coerce, intimidate, or harass Fresenius employees as they entered the voting area

OBJECTION #3: A union observer had his cell phone on during the voting period, which gave the RWDSU an unfair advantage and could have been used to interfere with Fresenius employees' free choice and to attempt to coerce, intimidate, or harass Fresenius's employees.

OBJECTION #4: A union observer (an off-duty employee of Fresenius) was paid by the Union on Thursday, August 3, 2017. Any such payment made by the RWDSU to the union observer causes the election to be suspect and, in this particular case, constitutes "unreasonable and excessive" economic inducements. *Collins & Aikman Corp. v. NLRB*, 383 F.2d 722, ("[U]nreasonable or excessive economic inducements should not be permitted."); *Plastic Masters, Inc. v. NLRB*, 512 F.2d 449 (1975) (recognizing overpayments by the union to an employee are suspect); *NLRB v. Commercial Letter, Inc.*, 455 F.2d 109, 114 (1972) ("The mere fact the payments were made causes the election to be suspect."). Such conduct interfered with Fresenius employees' free choice and attempted to coerce, intimidate, or harass Fresenius's employees.

OBJECTION #5: On Wednesday, August 2, 2017, a union observer was engaged in improper electioneering in the election area by talking to numerous employees in the patient care area (in violation of company policies and state regulations) after the pre-election conference and for approximately 10 minutes before the start of the voting period. Such conduct interfered with Fresenius employees' free choice and attempted to coerce, intimidate, or harass Fresenius's employees. *See generally Milchem, Inc.*, 170 NLRB 362, 362 (1968) (setting aside an election for improper electioneering and noting that "[t]he final minutes before an employee casts his vote should be his own, as free from inference as possible"); *NLRB v. McCarty Farms, Inc.*, 24 F.3d 725, 731–32 (5th Cir. 1994) (recognizing that improper electioneering under the *Milchem*

rule can occur both within the polling place and outside the polling place or a designated no-electioneering area).

For the foregoing reasons, the RWDSU destroyed the laboratory conditions pursuant to which a representation election must be held and thereby seriously interfered with the employees' freedom of choice. Accordingly, Fresenius requests a hearing on the genuine issues of material facts raised by these Objections, which will be supported by competent evidence that will be timely submitted to the Regional Director in accordance with the Board's Rules and Regulations.

Respectfully submitted,

/s/M. Jefferson Starling, III
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CERTIFICATE OF SERVICE

I do hereby certify that on this the 10th day of August, 2017, a true and correct copy of the foregoing document was filed with Region 15 using the NLRB's e-file procedures and served by e-mail on the following:

Robert. M. Weaver
E-mail: rweaver@qcwdr.com
George N. Davies
E-mail: gdavies@QCWDR.COM
Quinn, Connor, Weaver, Davies & Rouco LLP
Birmingham Office
Two North Twentieth
2 – 20th Street North, Suite 930
Birmingham, AL 35203

/s/ M. Jefferson Starling, III
M. Jefferson Starling, III

Case No. 15-RC-201753 (Bio-Medical Applications of Alabama, Inc. d/b/a Fresenius Kidney Care Dauphin Island Parkway)

Offer of Proof

Offer of Proof for Objection No. 1 – Picketing in Violation of 8(g)

Fresenius will produce video of the picketing showing, among other things, picketers on the sidewalk, picketers standing in the entranceway to the DIP clinic, picketers talking to passengers in cars that stopped in the entranceway, and vehicles with patients, employees, and third parties entering the entranceway where the picketers were stationed. Fresenius also will produce pictures of the picketers. RN Tyva Gullette (Cell No. 251-709-7529; tyvagullette@yahoo.com) will testify that she arrived around 5:00 and saw the picketers with their signs. She will testify that patients asked who the picketers were, what was going on, and why were they present. Clinic Manager Harriett Watters will testify that she was informed about the morning picketers and that she saw the picketers during the middle of the day and that the picketers walked in the entranceway to talk to the passenger(s) of a dark truck. Lead Employee Relations Manager Melissa Jacobs will testify she observed the picketers, including them talking to a black male in a pickup truck stopped in the entranceway. The witnesses will testify that the entranceway that was picketed is the only entranceway to the clinic.

Offer of Proof for Objection No. 2 – RWDSU Representative in Polling Area

RN Sheila White (251-786-7903; supamother@yahoo.com) and Consultant Sherry Henry will testify that on Wednesday, August 2, 2017, approximately 20 minutes before the conclusion of the voting time, White was stationed at the clinic window when the RWDSU representative arrived at the clinic and asked her where the election was being held. When White asked the RWDSU representative if she wanted to go to the voting area, the RWDSU representative confirmed that she did. White escorted the RWDSU representative through the offices of the clinic to the conference room where the voting was taking place. After the RWDSU representative stepped to the open conference room door and saw the election signage, she said she could not go into the conference room. The RWDSU representative was visible to observers and voters in the room, and the NLRB agent asked who she was. The RWDSU representative then exited to the right through a glass door to the outside. Sherry Henry, Melissa Jacobs, and Director-Employee Relations Denise Patterson will testify they saw the RWDSU representative standing at the glass door looking into the clinic where she could see employees entering the conference room to vote. Likewise, employees entering the conference room to vote could see the RWDSU representative through the glass door.

Offer of Proof for Objection No. 3 - Union Observer with Cell Phone

On Wednesday, August 2, 2017, Union observer Martavious Hall kept a cell phone in his pocket during the voting period at Dauphin Island Parkway. Prior to the start of the election, Melissa Jacobs asked the NLRB representative to advise Hall to turn off his cell phone. The NLRB agent disagreed and said that he could monitor the observer's activity but not tell him to turn off his phone. Hall kept the cell phone in his pocket and did not appear to turn it off. This was observed

by both Melissa Jacobs and Sherry Henry, who will testify to these facts. Jacobs will testify that the following day, RWDSU Representative Josh Brewer stated that he would advise Hall to turn off his cell phone during the election.

Offer of Proof for Objection No. 4 – Union Observer Paid by RWDSU

Melissa Jacobs will testify that on Thursday, August 3, 2017, she heard Josh Brewer (RWDSU Representative) state that Martavious Hall was on his payroll that day. The comment was made during the election at West Mobile. Jacobs will also testify that Hall was not scheduled to and did not work for Fresenius on that day. Hall served as an election observer on that day for only two hours. Harriett Watters can also testify as to Hall's schedule and company policies.

Offer of Proof for Objection No. 5 - Union Observer Politicking in Election Area

Melissa Jacobs will testify that on Wednesday, August 2, 2017, after the pre-election conference and about 10 minutes before the start of the voting at Dauphin Island Parkway, Union observer Martavious Hall, who was off-duty, went into the patient treatment area in violation of company policies and state regulations and talked with numerous employees.

INTERNET
FORM NLRB-508
(2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

FORM EXEMPT UNDER 44 U.S.C 3512

DO NOT WRITE IN THIS SPACE	
Case	Date Filed

INSTRUCTIONS: File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. LABOR ORGANIZATION OR ITS AGENTS AGAINST WHICH CHARGE IS BROUGHT

a. Name	b. Union Representative to contact	
Retail, Wholesale and Department Store Union	Josh Brewer	
c. Address *(Street, city, state, and ZIP code)*	d. Tel. No.	e. Cell No.
1901 10th Avenue North, Birmingham, Alabama 35205	205-322-7462	205-420-9309
	f. Fax No.	g. e-Mail
	205-322-8447	jbrewer@rwdsumidsouth.org

h. The above-named organization(s) or its agents has *(have)* engaged in and is *(are)* engaging in unfair labor practices within the meaning of section 8(b), subsection(s) *(list subsections)* ____ of the National Labor Relations Act, and these unfair labor practices are unfair practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*

On or about Tuesday, July 11, 2017, the above-named labor organization violated Section 8(g) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(g), by picketing at Employer's healthcare institution without providing notice in accordance with the NLRA.

3. Name of Employer	4a. Tel. No.	b. Cell No.
Bio-Medical Applications of Alabama, Inc. d/b/a Fresenius Kidney Care Dauphin Island Parkway	800-881-5101	
	c. Fax No.	d. e-Mail

5. Location of plant involved *(street, city, state and ZIP code)*	6. Employer representative to contact
2381 Dauphin Island Parkway, Mobile, Alabama 36605	B. Chelsea Phillips, Att. for Emp./Charging Party

7. Type of establishment *(factory, mine, wholesaler, etc.)*	8. Identify principal product or service	9. Number of workers employed
clinic	dialysis	19

10. Full name of party filing charge	11a. Tel. No.	b. Cell No.
Bio-Medical Applications of Alabama, Inc. d/b/a Fresenius Kidney Care Dauphin Island Parkway	800-881-5101	
	c. Fax No.	d. e-Mail

11. Address of party filing charge *(street, city, state and ZIP code.)*
2381 Dauphin Island Parkway, Mobile, Alabama 36605

12. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By _____ Chelsea Phillips
(signature of representative or person making charge) *(Print/type name and title or office, if any)*

1901 Sixth Avenue North, Suite 1500, Birmingham,
Address Alabama 35203 *(date)* 7/19/2017

Tel. No.
205-226-3443
Cell No.
251-656-7783
Fax No.
205-488-5905
e-Mail cphillips@balch.com

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

Confirmation

You have successfully E-Filed document(s). You will receive an E-mail acknowledgement from this office when it receives your submission. This E-mail will note the official date and time of the receipt of your submission. Please save this E-mail for future reference. Please print this page for your records.

NOTE: This confirms only that the document was filed. It does not constitute acceptance by the NLRB. Confirmation information

Confirmation Number: 1000152093
Date Submitted: 7/19/2017 5:32:16 PM (UTC-06:00) Central Time (US & Canada)

Charge Type : CB
Unit Location: Mobile, AL
Employer: Bio-Medical Applications of Alabama, Inc. d/b/a Fresenius Kidney Care Dauphin Island Parkway
Submitted E-File To Office: Region 15, New Orleans, Louisiana

Contact Info:
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Birmingham, AL 35201
(205) 226-3443
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Additional Emails: hlebischak@balch.com

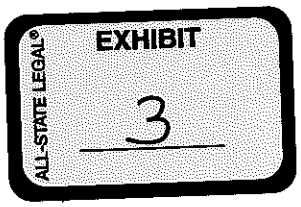
Attached E-File(s):
Signed Charge Against Union DIP Facility.pdf

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 15
600 South Maestri Place – 7th Floor
New Orleans, LA 70130-3413

Agency Website: www.nlrb.gov
Telephone: (504)589-6361
Fax: (504)589-4069

September 29, 2017



Chelsea Phillips, Esquire
BALCH & BINGHAM LLP
1901 6th Ave N Ste 1500
Birmingham, AL 35203-4642

Jeff Starling, Esquire
BALCH & BINGHAM LLP
1901 6th Ave N Ste 1500
Birmingham, AL 35203-4642

Re: Retail, Wholesale and Department Store Union (Bio-Medical Applications of Alabama, Inc., d/b/a Fresenius Kidney Care Magnolia)
Case Nos.: 15-CG-204234
15-CG-204243
15-CG-204253

Dear Ms. Phillips and Mr. Starling:

We have carefully investigated and considered your charge that Retail, Wholesale, and Department Store, Local 932 (Union) has violated the National Labor Relations Act (Act).

Decision to Dismiss: Based on that investigation, I have decided to dismiss your charge for the reasons discussed below.

On July 20, 2017, you filed three charges alleging the Union unlawfully picketed outside three healthcare facilities without providing sufficient advance notice in violation of Section 8(g) of the Act. The Board has held that a "necessary condition" of picketing includes "a confrontation in some form between union members and employees, customers, or suppliers who are trying to enter the employer's premises." *Chicago Typographical Union 16*, 151 NLRB 1666, 1669 (1965). Here, the investigation revealed that for a few hours on July 11 and 12, 2017, two Union representatives stood next to a stationary Union sign on a public sidewalk adjacent to the street entrance to the Employer's facilities. The investigation disclosed insufficient evidence that the Union representatives blocked ingress or egress to the facilities. Accordingly, I have determined the Union's actions were not sufficiently confrontational to give rise to a violation of the Act. *United Brotherhood of Carpenters Local 1506*, 355 NLRB 797, 802 (2010).

Retail, Wholesale and Department Store
Union (Bio-Medical Applications of
Alabama, Inc., d/b/a Fresenius Kidney Care
Magnolia)
Case 15-CG-204234

Your Right to Appeal: You may appeal my decision to the General Counsel of the National Labor Relations Board, through the Office of Appeals.

Means of Filing: An appeal may be filed electronically, by mail, by delivery service, or hand-delivered. To file electronically using the Agency's e-filing system, go to our website at www.nlrb.gov and:

1) Click on E-File Documents;
2) Enter the NLRB Case Number; and,
3) Follow the detailed instructions.

Electronic filing is preferred, but you also may use the enclosed Appeal Form, which is also available at www.nlrb.gov. You are encouraged to also submit a complete statement of the facts and reasons why you believe my decision was incorrect. To file an appeal by mail or delivery service, address the appeal to the **General Counsel** at the **National Labor Relations Board, Attn: Office of Appeals, 1015 Half Street SE, Washington, DC 20570-0001**. Unless filed electronically, a copy of the appeal should also be sent to me.

The appeal MAY NOT be filed by fax or email. The Office of Appeals will not process faxed or emailed appeals.

Appeal Due Date: The appeal is due on **October 13, 2017**. If the appeal is filed electronically, the transmission of the entire document through the Agency's website must be completed **no later than 11:59 p.m. Eastern Time** on the due date. If filing by mail or by delivery service an appeal will be found to be timely filed if it is postmarked or given to a delivery service no later than October 12, 2017. **If an appeal is postmarked or given to a delivery service on the due date, it will be rejected as untimely**. If hand delivered, an appeal must be received by the General Counsel in Washington D.C. by 5:00 p.m. Eastern Time on the appeal due date. If an appeal is not submitted in accordance with this paragraph, it will be rejected.

Extension of Time to File Appeal: The General Counsel may allow additional time to file the appeal if the Charging Party provides a good reason for doing so and the request for an extension of time is **received on or before October 13, 2017.** The request may be filed electronically through the ***E-File Documents*** link on our website www.nlrb.gov, by fax to (202)273-4283, by mail, or by delivery service. The General Counsel will not consider any request for an extension of time to file an appeal received after October 13, 2017, **even if it is postmarked or given to the delivery service before the due date**. Unless filed electronically, a copy of the extension of time should also be sent to me.

Retail, Wholesale and Department Store
Union (Bio-Medical Applications of
Alabama, Inc., d/b/a Fresenius Kidney Care
Magnolia)
Case 15-CG-204234

Confidentiality: We will not honor any claim of confidentiality or privilege or any limitations on our use of appeal statements or supporting evidence beyond those prescribed by the Federal Records Act and the Freedom of Information Act (FOIA). Thus, we may disclose an appeal statement to a party upon request during the processing of the appeal. If the appeal is successful, any statement or material submitted with the appeal may be introduced as evidence at a hearing before an administrative law judge. Because the Federal Records Act requires us to keep copies of case handling documents for some years after a case closes, we may be required by the FOIA to disclose those documents absent an applicable exemption such as those that protect confidential sources, commercial/financial information, or personal privacy interests.

Very truly yours,

M. Kathleen McKinney
Regional Director

MKM/pal

Enclosure

cc: Bio-Medical Applications of Alabama, Inc.,
d/b/a Fresenius Kidney Care Magnolia Grove
7940 Moffett Road
Semmes, AL 36575-5408

Josh Brewer, Representative
Retail, Wholesale, and Department Store, Local 932
1901 10th Ave South
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George N. Davies, Attorney
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Birmingham, AL 35203

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, DC 20570

February 2, 2018

M. JEFFERSON STARLING III, ESQ.
BALCH & BINGHAM LLP
1901 6TH AVE N STE 1500
BIRMINGHAM, AL 35203-4642

Re: Retail, Wholesale and Department Store Union (Bio-Medical Applications of Alabama, Inc., d/b/a Fresenius Kidney Care Magnolia)
Cases 15-CG-204234
15-CG-204243
15-CG-204253

Dear Mr. Starling:

This office has carefully considered your appeal. The appeal is sustained. We concluded that the Retail, Wholesale and Department Store Union arguably violated Section 8(g) of the Act by failing to provide proper notice to the Employer that it would be picketing at its facilities. We are remanding the cases to the Regional Director for further action. Absent settlement, the Regional Director will issue a complaint and an administrative law judge will hold a hearing. Please address all further inquiries to the Regional Director.

Sincerely,

Peter Barr Robb
General Counsel

Mark E. Arbesfeld

By: _____
Mark E. Arbesfeld, Director
Office of Appeals

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
SETTLEMENT AGREEMENT

IN THE MATTER OF

Retail, Wholesale and Department Store Union, Mid-South Council	**Cases 15-CG-204243**
(Bio-Medical Applications of Alabama, Inc., d/b/a Fresenius Kidney	**15-CG-204253**
Care Azalea City and Fresenius Kidney Care Dauphin Island Parkway)	

Subject to the approval of the Regional Director for the National Labor Relations Board, the Charged Party and the Charging Party **HEREBY AGREE TO SETTLE THE ABOVE MATTER AS FOLLOWS:**

POSTING OF NOTICE — After the Regional Director has approved this Agreement, the Regional Office will send copies of the approved Notice to the Charged Party in English and in additional languages if the Regional Director decides that it is appropriate to do so. A responsible official of the Charged Party will then sign and date those Notices and immediately post them on the bulletin board in the break room at the following locations: 2381 Dauphin Island Parkway, Mobile, AL and 65 N. Catherine Street, Mobile, AL. The Charged Party will keep all Notices posted for 60 consecutive days after the initial posting.

COMPLIANCE WITH NOTICE — The Charged Party will comply with all the terms and provisions of said Notice.

NON-ADMISSION CLAUSE — By entering into this Settlement Agreement, the Charged Party does not admit that it has violated the National Labor Relations Act.

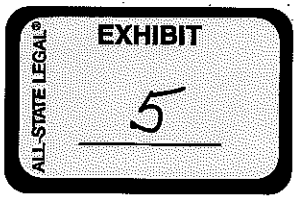
SCOPE OF THE AGREEMENT — This Agreement settles only the allegations in the above-captioned case(s), including all allegations covered by the attached Notice to Employees made part of this agreement, and does not settle any other case(s) or matters. It does not prevent persons from filing charges, the General Counsel from prosecuting complaints, or the Board and the courts from finding violations with respect to matters that happened before this Agreement was approved regardless of whether General Counsel knew of those matters or could have easily found them out. The General Counsel reserves the right to use the evidence obtained in the investigation and prosecution of the above-captioned case(s) for any relevant purpose in the litigation of this or any other case(s), and a judge, the Board and the courts may make findings of fact and/or conclusions of law with respect to said evidence.

PARTIES TO THE AGREEMENT — If the Charging Party fails or refuses to become a party to this Agreement and the Regional Director determines that it will promote the policies of the National Labor Relations Act, the Regional Director may approve the settlement agreement and decline to issue or reissue a Complaint in this matter. If that occurs, this Agreement shall be between the Charged Party and the undersigned Regional Director. In that case, a Charging Party may request review of the decision to approve the Agreement. If the General Counsel does not sustain the Regional Director's approval, this Agreement shall be null and void.

AUTHORIZATION TO PROVIDE COMPLIANCE INFORMATION AND NOTICES DIRECTLY TO CHARGED PARTY — Counsel for the Charged Party authorizes the Regional Office to forward the cover letter describing the general expectations and instructions to achieve compliance, a conformed settlement, original notices and a certification of posting directly to the Charged Party. If such authorization is granted, Counsel will be simultaneously served with a courtesy copy of these documents.

Yes GNB (Initials) No _____ (Initials)

PERFORMANCE — Performance by the Charged Party with the terms and provisions of this Agreement shall commence immediately after the Agreement is approved by the Regional Director, or if the Charging Party does not enter into this Agreement, performance shall commence immediately upon receipt by the Charged Party of notice that no review has been requested or that the General Counsel has sustained the Regional Director.



GNB

(To be printed and posted on official Board notice form)

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT engage in picketing at Fresenius Kidney Care Dauphin Island Parkway and Fresenius Kidney Care Azalea City (Fresenius) if we have not given Fresenius and the Federal Mediation and Conciliation Service 10 days notice of that intention.

WE WILL NOT in any similar way restrain or coerce you in the exercise of your rights under Section 7 of the Act.

WE WILL, before picketing at Fresenius Kidney Care Dauphin Island Parkway and Fresenius Kidney Care Azalea City, give Fresenius and the Federal Mediation and Conciliation Service not less than 10 days notice of that intention.

Retail, Wholesale, and Department Store Union, Mid-South Council

(Employer)

Dated: _____ **By:** _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-844-762-NLRB (1-844-762-6572). Hearing impaired callers who wish to speak to an Agency representative should contact the Federal Relay Service (link is external) by visiting its website at https://www.federalrelay.us/tty (link is external), calling one of its toll free numbers and asking its Communications Assistant to call our toll free number at 1-844-762-NLRB.

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